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No. 243.

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Brief of Clark for Respondent.

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

Filed Mar. 17, 1899.

No. 243.

AMEDEE D. MORAN ET AL., PURCHASING TRUSTEES, PETITIONERS,

versus

CHARLES DILLINGHAM, RESPONDENT.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

BRIEF OF RESPONDENT.

GEORGE CLARK,
D. C. BOLINGER,
Counsel for Respondent.

PRESS OF ROBB BATTLE, WACO.

IN THE

SUPREME COURT OF THE UNITED STATES,

OCTOBER TERM, 1898.

No. 243.

AMEDEE D. MORAN ET AL., PURCHASING TRUSTEES, PETITIONERS,

versus

CHARLES DILLINGHAM, RESPONDENT.

BRIEF OF RESPONDENT.

The statement of the case in the brief for petitioners is in a general way correct, with the exception of certain important omissions which will be noticed in the brief of the argument herein submitted.

Respondent submits in reply the following propositions:

PROPOSITION I.

The fact that Hon. Don A. Pardee, Circuit Judge, entered orders and decrees in the original cause of Morgan's Louisiana and Texas Railroad and Steamship Company vs. The Texas Central Railway Company, did

not disqualify him from sitting on appeal in this cause, which was a separate and distinct matter under the act of March 3rd, 1891.

PROPOSITION II.

The Circuit Court of Appeals in deciding the case did not invade the province of the trial Court and Master in setting aside the report of the Master and the decree of the Circuit Court, because it clearly appeared therefrom that such report and confirmation was erroneous and mistaken on the part of the lower tribunals upon the indubitable facts contained in the record.

BRIEF OF THE ARGUMENT.

Upon the first proposition submitted above as to the disqualification of Circuit Judge Pardee, counsel for respondent submits that such disqualification did not obtain. The act of March 3rd, 1891, is peculiar in this, that it seems to provide for non-disqualification expressly for a case similar to this at bar. The language of the statute is as follows:

"That no justice or judge before whom *a cause or question* may have been tried in the District Court or existing Circuit Court shall sit on the trial or hearing of such *cause or question* in the Circuit Court of Appeals."

Had the usual language been employed which obtains in all our state constitutions, the contention of petitioners in this cause might have some foundation upon which to rest. I say "some foundation" with a qualification that even in that event the disqualification of the judge would not be apparent. Speaking accurately, the cause submitted to the Circuit Court of Appeals in May, 1896, was not the cause in which Judge Pardee made certain orders up to the fall of 1891. That cause was Morgan's Louisiana and Texas Railroad and Steamship Company et al. vs. The Texas Central Rail-

way Company. The cause heard by the Circuit Court of Appeals at New Orleans was the cause of Charles Dillingham, appellant, vs. Amedee D. Moran et al., purchasing trustees. The titles of the two causes were different. the parties were different, their numbers were different and the issues involved were different. So even giving to the statute the broadest interpretation possible, the two causes were not the same. The statute says, "a cause *or* question." Subjected to proper construction, these words could not be extended so as to disqualify a judge who had decided on the circuit the very question presented for decision on appeal in some other case, because that would involve an absurdity on its face. Evidently the legislative mind in the enactment of the statute contemplated what is very often the case, especially in equity, that a question may arise or an issue may be presented practically foreign to the issues involved in the original cause which being decided upon the circuit is appealed for revision to the appellate tribunal without involving in any manner the main controversy. Of course if this suit here now on certiorari involved the final decree appealed from in the original cause, Judge Pardee would be disqualified; or had the judge presiding on the circuit, upon the hearing of the issues presented by the exceptions of petitioners herein to the original Master's report in April, 1895, have rendered the decision therein, he would, in like manner, have been disqualified. But such is not the case at bar. The last order entered by Judge Pardee upon the circuit in the original cause was in the latter part of 1891, as shown by the record. This controversy arose in 1895, having no reference to or connection with the issues between complainants and respondents in the original cause. Upon application of these petitioners an order was entered upon the circuit by Circuit Judge McCormick referring to Receiver's accounts back to a new Master, in compliance with a violent attack upon the Receiver involving the charges of mal-

feasance, misapplication, fraud and concealment on his part of the trust funds in his hands. The issues made by petitioners in their pleadings were finally heard and determined by the Hon. Charles Swayne of the Northern District of Florida, sitting by assignment in the Circuit Court for the Northern District of Texas, at Waco, and these issues were presented by the petitioners herein, to-wit:

1. That respondent had performed no services entitling him to charge the sum of $150.00 per month and was not authorized to retain the same by any order of Court from the first of July, 1893, to April, 1895.

2. That respondent during that whole time had been drawing practically as interest on deposit of the trust funds from a bank in which he was interested, the sum of $1000.00 per annum, which was received by him personally and appropriated to his own use. (R. pp. 27-28.)

These were the issues upon which the reference back to the Special Master was made by Circuit Judge McCormick on April 8th, 1895. (R. pp. 28-29.) Afterwards, to-wit, on November 4th, 1895, the petitioners filed with the Special Master what they call an "amended exceptions of purchasing trustees," in which they elaborate these contentions, but without substantially changing the issues originally presented by their former exceptions, except that petitioners charge the respondent, in addition to other crimes formerly charged, with making false reports under oath to the Court with reference to the moneys handled by him under the order of the Court. (R. pp. 29-31.) The questions, therefore, presented to the Circuit Court were:

First. Had respondent performed any services entitling him to retain the sum of $150 per month from 1891 to 1895?

Second. Had he acted fraudulently and violated his

trust as Receiver in manner and form as complained of?

Third. (by amendment) Whether the payment of the sum of $20,000 in 1891 and the receipt by the respondent of that sum, was paid and received with a full understanding and agreement on each side that it was to cover all services of respondent to the final termination of the receivership.

The record fails to disclose that Circuit Judge Pardee had ever tried in the Circuit Court either one of these questions. On the contrary, it conclusively establishes and is admitted that he had not. How, then, can it be maintained that he was recused from disposing of these issues on appeal? He had not tried the cause; neither had he tried the questions on the circuit. And the mere fact that this cause arose out of the original cause of Morgan's Louisiana and Texas Railroad and Steamship Company vs. The Texas Central Railway Company cannot subject him to disqualification, because frequently and independently one suit is dependent upon another with which it has no legal connection, but to which it owes its origin. The purpose of the statute of course is manifest and proper, but the attempt on the part of petitioners to distort it, is not only manifestly erroneous, but would subject the Courts to serious disturbance and inconvenience.

Counsel for petitioners seems to lay stress upon the idea that the decision of the questions involved in this particular cause depended upon the construction of an order entered by Circuit Judge Pardee in 1886, allowing the Receiver on current account $150 per month to the termination of the receivership and urged that this order, having been entered by Circuit Judge Pardee upon the circuit, necessarily disqualified him from construing its provisions. If this idea should be carried into practical effect, it would paralyze the judiciary. This Court is frequently called upon to construe its own orders and decrees in other cases and to explain

what was meant by its former decisions. This Court is also frequently called upon to explain and expound what was the legal effect of orders and decrees or its several members on the Circuit which were involved in subsequent independent litigation. If recusation followed in the one instance, it ought to follow in the other, and the tongues of our judges would be palsied by the principle invoked herein.

We submit, therefore, upon the first proposition that Circuit Judge Pardee was not disqualified from hearing the cause on appeal and that the writ of certiorari herein granted should be discharged

2.

In the second proposition there is no controversy between counsel for petitioners and counsel for respondent as to the law and the rules established by this Court. The Master's finding is entitled to every reasonable presumption in his favor, and is not to be set aside or modified unless there appears to have been error or mistake on his part. This is an established principle which no lawyer ever contradicts. That conceded, however, leaves the true question still open for determination Plain error was established by the record and against the Master's finding. The order of December 4th, 1886, directed that the allowance of $150 per month to the respondent as receiver should continue so long as he "gives his personal attention to the business of the company, or until the further order of the Court." (R. p. 6.)

The finding of the Master is that the compromise made in September, 1891, allowing C. Dillingham, Receiver, $20,000 was intended as revoking the order of December 4th, 1886, allowing him $150 per month. (R. p. 147)

The Master does not vouchsafe how the decree of a

Court can be revoked by the act of private parties, but it seems that he found this as a fact. Plainly, this was an error and mistake in the face of the record, for such revocation could not thus occur, especially in view of other portions of the record, which show that after the sale of the physical property of the railroad in 1891 and upon two separate petitions of these petitioners, the Court expressly retained custody of other property of the railroad company not sold, and decreed that no previous order should be construed as affecting the receivership of such property so remaining, but the same was retained by the Court in the hands of the receiver for further administration. (R. pp. 18-27.)

It was shown without contradiction that this property consisted of lands, town lots, purchase money notes and cash, all of which remained in the hands of the receiver and in the custody of the Court, and was administered by the respondent as receiver during the years from 1891 to 1895, regular quarterly reports of such receipts and expenditures being filed by the receiver in accordance with the orders of the Court and as its officer.

Against this solid array of fact, petitioners make their assault by supposition, and the Master bases his finding upon the supposition, rejecting the facts. How, then, can it be successfully urged that the Master did not manifestly err in his findings? He finds that the compromise settlement in 1891 was intended as a revocation of the order allowing respondent $150 per month as receiver, and immediately upon such finding awards the receiver $150 per month (to which he says he was not entitled) for two years up to April, 1893, basing his action in this regard upon the technicality of the rule regarding confirmation of the Master's reports within thirty days after filing, if not objected to. If the order of 1886 was revoked by the compromise, it would seem logically to follow that the respondent was not entitled to anything from 1891 to 1895 for his services as re-

ceiver, notwithstanding the failure of petitioners to except to the reports of the Master approving such allowance. The question submitted was not one of *quantum meruit*, but of legal record, and it was wholly immaterial what services the receiver performed, or was called upon to perform, upon the question of his compensation. The order of 1886 stood unrevoked until this day, the Master's finding to the contrary notwithstanding. Indeed, upon the final outcome of the issues raised by petitioners against respondent, they abandon all of such issues, including the services performed and their value, and rest their cause exclusively, as they rest it here, upon the effect of an alleged compromise made in 1891. It is therefore submitted, without going into further details, that these acts of the Master show that it was manifestly contrary to the record and contrary to law and reason; and the Circuit Court of Appeals did not err in setting it aside, as it should have been set aside by District Judge Swayne sitting upon the circuit.

3.

The main contention of the petitioners rests upon the effect of the compromise made and entered into on the 24th of August, 1891, they contending that said compromise was tendered and accepted as full satisfaction of all services of the receiver up to date of his discharge from the receivership. And to this we now address ourselves.

This contention is rested upon the following receipt:

"Received of Messrs. Moran, Gold and McHarg, purchasing committee, the sum of Twenty Thousand ($20,000) Dollars in full of my fees and charges as receiver of The Texas Central Railway Company, as per agreement.

Dated, Houston, Texas, Sept. 14, 1891.

(Signed) CHARLES DILLINGHAM, Receiver."

Counsel for petitioners seem to assume that this receipt amounts to the solemnity of an estoppel, and is not explainable. It is needless to say in reply to this that it is like any other receipt in any other Court, subject to oral explanation and qualification. Authorities are not necessary to support this statement. The circumstances and surroundings must all be taken into consideration in construing the effect of the receipt, as well as the intention of the parties. What were these circumstances as disclosed by the record? This railway property has been in the hands of the Court since 1885. Respondent had been placed in charge of the railroad under foreclosure proceedings in the Circuit Court and had acted as receiver in the active management of the property up to August, 1891. The final decree was rendered in the cause in 1887, from which an appeal was prosecuted to this Court, where the decree of the lower Court was affirmed. This involved a delay of nearly or quite four years. The railroad proper was then sold under foreclosure proceedings and such property turned over to these petitioners as purchasing trustees, who thereupon became parties to the suit, as alleged by petitioners in their amended exceptions, and as is manifest from different parts of the record. (R., p. 29.) It was supposed by all parties that this would terminate the receivership at once, and proceedings were instituted by various parties—trustee, attorneys, receiver, master, etc., to have their allowances, fixed upon the basis of an immediate termination of the receivership. This was in August, 1891. A compromise was reached upon that basis under which respondent abated his demand of $30,000 as compensation for six years work, being at the rate of about $5000 per annum, and accepted $20,000 as compensation for his services as receiver. Nothing was said on either side as to a continuance of the receivership, and it was not within the contemplation of the parties at the time the settlement was made. For reasons which perhaps pe-

titioners could explain, the receivership was continued more than four years thereafter. Respondent, in his testimony and in reply to questions propounded by counsel for petitioners, testified that M. F. Mott, Esq., attorney for the Farmers Loan and Trust Company, trustee, and for those petitioners, when approached by respondent with the suggestion as to closing up the receivership at once, which occurred somewhere about March 12, 1894; that he was told by said counsel that there were some legal questions involved that they were endeavoring to reach a conclusion upon, and would have the receivership closed as soon as possible. (R., p. 45.) The Special Master, John G. Winter, before whom claims for allowance were filed, testified that when these allowances were compromised and paid in 1891, it was upon the supposition that the receivership was to be immediately closed. (R., p. 67.) .

On August 28th, 1891, several days after the compromise was agreed upon, upon the application of these petitioners the Court entered an order to the following effect, among other things:

"That nothing in this decree contained is intended to affect, or shall be construed as affecting, the status of any pending or undetermined litigation in which said receivers appear as parties; such litigation shall continue to determination in the name of said receivers, with the right reserved to said purchasers, should they be so advised, to appear and join in any such litigation; and nothing in this decree contained is intended to affect, or shall be construed as affecting the receivership of any of the property of the defendant railway company other than the property so transferred to said purchasers, possession of which said property other than that so transferred is retained for further administration, subject to the orders of this Court." (R. pp. 18-22)

Subsequent to this, on November 4th, 1891, and upon a like petition of these petitioners, Mr. Mott, herein-

before mentioned, appearing as their counsel, the Court made a further order of exactly similar tenor and effect with reference to the continuance of the receivership indefinitely for the purpose of administering assets of the insolvent corporation not theretofore administered. (R. pp. 23-27.) Nearly two years subsequent to this, to-wit, on March 12th, 1894, these petitioners being all the while parties to this suit, as hereinbefore stated, Henry K. McHarg, the president of The Texas Central Railway Company, the successor of the former insolvent Texas Central Railroad Company, being at the general office of the company in the city of Waco, Texas, where the Circuit Court held and where its records were contained, addressed this letter to the respondent:

"WACO, TEXAS, March 12, 1894.

Charles Dillingham, Esq., Houston, Texas.

DEAR SIR:—I am somewhat surprised to find that your accounts as receiver of the Texas Central road, have never been closed. The Farmers Loan and Trust Company communicated with Messrs. Mott & Armstrong, in Galveston, in October last, urging their immediate settlement; and I understand from a letter written by them to Mr. Campbell, our attorney, in January last that your attorneys in New Orleans, Messrs. Farrar, Jonas & Kruttschnitt, agreed that it ought to be done immediately.

I also notice that Mr. Winter has made a report up to Dec. 31st, 1892, inclusive, of the balance on hand. I suppose that when the road was sold his compensation as special master ceased, and that in fact there was no one under any pay except yourself, as receiver, until your discharge.

I trust you will follow out the spirit of your attorney's suggestion to Col. Mott, and at once co-operate with Messrs. Mott & Armstrong in closing the receiv-

ership and turning over the cash and assets to their owners. Very truly yours,

HENRY K. MCHARG, President."

(R. p. 83.)

We have, therefore, a total change in the situation and conditions of the receivership that was evidently not contemplated by the parties at the time of the original agreement of compromise. We have the Court, upon the petition of the petitioners, entering an order continuing the receivership indefinitely. We have also an entire absence of complaint in the record on the part of the petitioners for several years. In addition to this we have the admission in writing of Mr. McHarg, the president of the new company, and the active manager of the original purchasing committee, conceding to respondent the right claimed by him herein that he was under pay as receiver, notwithstanding the compromise, until his discharge. We have further a recognition of the willingness of the receiver and his anxiety to be discharged from his trust but continued delay with no movement upon the part of these petitioners to qualify the order of allowance made in 1886, or to change the existing conditions in any manner whatsoever. Mr. McHarg, one of the petitioners, evidently supposed on March 12th, 1894, that the compensation of every officer under the receivership had ceased except the pay of respondent as receiver, because he says so in writing when he was on the ground when the litigation was proceeding and had evidently inquired into it. He and his co-petitioners herein were parties to the litigation and charged with notice of its progress; and yet he comes into the Circuit Court in the face of this record and alleges in a solemn pleading that he did not know anything of the retention of the allowance by respondent until a short while before April, 1895, and proceeds to charge the respondent with fraud and corruption in

retaining and using the funds of the trust imposed upon him by the Court under the law.

Counsel for petitioners dismisses this letter with a waive of the hand, as fully explained by Mr. McHarg in his testimony, which explanation, it is sufficient to say, does not explain. In his testimony he says:

"I did not write the letter with the idea he was entitled to the $150 per month, or to any additional sum over the $20,000, for I considered that amount an outrage upon our committee to pay at the time, but we seemed forced to do so and had to submit. In fact, my letter was sent to him simply to try and limit our payments in the future, not with the idea or thought that he was entitled to anything, and, as you will notice, was written on March 12th, 1894, when The Texas Central Railway Company had assumed control of the property September 25th, 1891, or nearly two and a half years after we had been in possession." (R. pp. 69-70.)

The lucidity of this explanation makes it absolutely transparent. If he did not write the letter with the idea that the respondent was entitled to $150 per month or to any additional sum, why did he say in his letter:

"I suppose that when the road was sold his compensation as Special Master ceased, and that in fact there was no one under pay except yourself as receiver until your discharge?"

Under what pay? How to be paid? From what source? He was charged with knowledge of the record under which respondent had retained under the order of the Court since 1885, on current account, the sum of $150 per month in part payment for his services as receiver. He was charged with knowledge that this order had never been rescinded. He was charged with the further knowledge that he and his co-petitioners had never made any effort to have this order qualified or taken any proceedings to reduce the amount, to

rescind the order or to close the receivership. He acknowledges in the letter that Dillingham was under pay and would continue under pay as receiver until his discharge, and later testifies that at the time he wrote the letter he did not write it with the idea that Dillingham was entitled to any additional sum over the $20,000 paid him in 1891.

Arraying the facts as found by the Master and upon the testimony contained in the record, we find that immediately after the compromise was made that contrary to the expectation of all parties and with the consent and connivance of these petitioners and substantially upon their applications, repeated to the Court, the receivership was continued indefinitely, presumably for purposes of their own. No witness testified as to any agreement that the compromise should be in full of all services of the receiver To the contrary, the testimony of the respondent and the testimony of Winter, the Special Master, who received additional compensation, the acquiescence of the petitioners, and the letter of McHarg, all stand in array to show that after the compromise, by reason of changed conditions and purposes upon the part of these petitioners in part, the receivership was continued four years and large assets were left in the hands of this receiver, for which he was responsible; that for two years of the time he was engaged actively in administering these assets; that he held the moneys of the trust safely and securely, paying it out upon the orders of the Court from time to time and rendering his reports promptly and regularly as an officer of the Court. Under this state of facts he had at least the right to anticipate that if there should be objection in any manner to his conduct as receiver, such objection should be urged in decent and respectable manner, without attacking his character as a man and as an officer of the Court, for the pitiful sum of $3600.

In conclusion, we refer this Court to the opinion of Judge Newman, of the the Circuit Court of Appeals, as embodying the law of the case and as a proper decision of the questions involved, and submit that the writ of certiorari should be discharged and that the judgment of the Circuit Court of Appeals should stand affirmed.

Geo. W. Clark

D. C. Bolinger

Counsel for Respondent.